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January 26 2015

Bridget C. Bohac
Office of the Chief Clerk
Texas Commission on Environmental Quality
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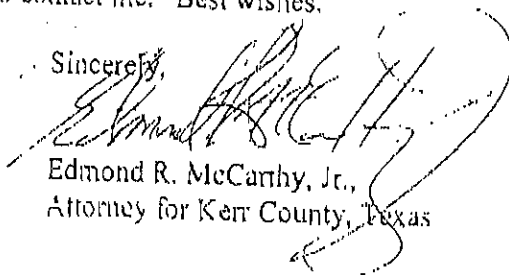
RE: TCEQ Docket No. 2014-1658-WR; Water Rights Permit No. 12378
Applicant, Guadalupe-Blanco River Authority
Mailing List for TCEQ Docket No. 2014-1658-WR

Dear Ms. Bohac:

Enclosed for filing please find the original and eleven copies of the Reply of Kerr County, Texas, to the Responses to Hearing Requests filed separately by the Commission's Executive Director and the Office of Public Interest Counsel in the above referenced matter.

By copy of this letter, the persons and entities on the attached Mailing List are receiving a copy of the County's Reply. Thank you for your assistance in this regard. Should you have any questions, please feel free to contact me. Best wishes.

Sincerely,


Edmond R. McCarthy, Jr.,
Attorney for Kerr County, Texas

ERM:in

cc: Mailing List for Docket No. 2014-1658-WR
Kerr County, Texas

CHIEF CLERK'S OFFICE

2015 JAN 26 PM 4:25

RECEIVED
ON DECEMBER 26, 2014

TCEQ DOCKET NO. 2014-1658-WR

APPLICATION BY GUADALUPE-
BLANCO RIVER AUTHORITY
PERMIT NO. 12378

§
§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF OF STAFF
OFFICE

2015 JAN 26 PM 11:25

ON
FILE
COUNTY

KERR COUNTY'S REPLY TO THE EXECUTIVE DIRECTOR'S AND OFFICE OF PUBLIC
INTEREST COUNSEL'S RESPONSES TO THE COUNTY'S HEARING REQUEST

COMES NOW, Kerr County, a party affected by the above referenced application of the Guadalupe-Blanco River Authority ("GBRA") for Permit Number 12378, and files this Reply to the separate Responses filed by the Executive Director and the Office of Public Interest Counsel to the County's request for a contested case hearing in this matter.

I.

Response to the Executive Director

The Executive Director appears to summarily dismiss the request for a contested case hearing filed by Kerr County on the theory that (i) Kerr County does not hold a water right in the Guadalupe River basin, and, in the Executive Director's opinion, (ii) Kerr County's M.O.U. with GBRA specific to the acquisition of water rights in the Guadalupe River basin supported by and/or based upon GBRA's water rights is somehow "not an interest that is protected by the Texas water code in TCEQ's issuance of a water rights permit." See ED's Response to Hearing Requests @ 9.

The Executive Director's conclusions are erroneous. By letter dated August 29, 2013, the Kerr County Attorney timely filed a letter with the commission's chief clerk requesting party status and a contested case hearing in this matter (the "County's Request").¹ The County's Request specifically articulated issues raised by the GBRA application that would directly affect the County's interests in and ability to obtain water from the Guadalupe Blanco River, as well as its rights pursuant to the M.O.U. with the applicant GBRA. The Executive Director's Response failed to analyze or address the relevant factors prescribed by the Commission's Rules.

The relevant factors for determining whether or not a person requesting a contested case hearing is an "affected person" are prescribed by Section 55.256 of the Commission's rules as follows:

- (a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

¹ A copy of Kerr County's Hearing Requested is attached hereto as Appendix "A," and incorporated herein by reference for all purposes.

- (b) Except as provided by §55.103 of this title (relating to Definitions), governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.
- (c) All relevant factors shall be considered, including, but not limited to, the following:
 - (1) whether the interest claimed is one protected by the law under which the application will be considered;
 - (2) distance restrictions or other limitations imposed by law on the affected interest;
 - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
 - (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
 - (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

See 30 TAC §55.256 (Determination of an Affected Person).

Kerr County's Hearing Request satisfied these criteria and should be granted:

1. Kerr County through both its authority to develop water supplies to meet the needs within Kerr County² and the MOU with GBRA gives the County a personal justiciable interest related to its legal rights, duties, privileges, powers, or economic interests affected by the application. Kerr County's contractual rights in the MOU, which are directly impacted by the proposed Permit and GBRA's operations pursuant to its terms and conditions, examples of which are highlighted in the County's Request, demonstrate that the County's issues and interests in protecting its MOU and the outcome of the Commission's decision on whether to grant Permit Number 12378 is not merely an interest common to members of the general public. Moreover, Kerr County's distinction as a governmental entity and, in particular, a uniquely situated entity being a county with a river running through it gives it standing and status as an affected person for purposes of having its hearing request granted. See 30 TAC §55.256(a)-(b).

² See Tex. Local Gov't Code §§562.013-562.014, 562.016.

2. In addition to protecting the County's contractual rights pursuant to the MOU related directly to water in and from the Guadalupe River Basin as a result of the rights GBRA seeks to acquire pursuant to Permit Number 12378, including GBRA's requests to modify its operation of its water rights in Canyon Lake which could impair the County's legal rights, under the permitting provisions of Chapter 11, Texas Water Code, the County's right to a contested case hearing should be granted to allow the County to protect its riparian rights. As noted, Kerr County is not only a county with a river that flows through it, *i.e.*, the Guadalupe River, Kerr County is the situs of the headwaters of the Guadalupe River, and the County owns and operates property adjacent to the River with attendant riparian rights to be protected, including parks with recreational uses in the river that are afforded to its citizens, and other visitors to Kerr County which the County is responsible to protect. *See* 30 TAC §55.256(c)(1)-(2). The County's contractual, riparian and other rights are directly affected by the Commission's decision on whether to issue the requested permit and, if granted, under what conditions and restrictions. The County is entitled to participate in that process through a contested case hearing. *See* 30 TAC §55.256(c)(2)-(3), (5).
3. The County's contractual rights under the MOU were secured to facilitate the County's ability to develop water resources pursuant its lawful authority to undertake such projects³ for the protection of the public health and safety of the citizens of Kerr County, and the use of County properties, including its parks and riparian water rights. *See* 30 TAC §55.256(c)(4)-(5).
4. Kerr County is a body politic and corporate with statutory authority over and interest in the issues relevant to the application it seeks to protect under its MOU with the Applicant GBRA pursuant to Section 562.013-562.014, and 562.016, Tex. Local Gov't Code, *See* 30 TAC §55.256(c)(6).

Accordingly, the Commission should disregard the Executive Director's unsupported recommendation, find that Kerr County is an affected person and, thereafter, grant the County's hearing request.

II.

Response to the Office of Public Interest Counsel

The County concurs with the analysis and recommendation of the Office of Public Interest Counsel ("OPIC") that (i) the County be found to be an "affected party," and (ii) its request for a contested case hearing be granted.

OPIC correctly notes that the application could negatively impact the County's rights under its M.O.U. with the GBRA to secure up to 6000 acre-feet of water per Anna Guadalupe River. Additionally, OPIC correctly notes that the County has lawful authority over the issues and

³ *See id.* §§562.014, 562.016.

interests raised in its hearing request, one of the criteria specified in Section 55.256(c)(6) (30 TAC).

**III.
Conclusion**

WHEREFORE, premises considered, Kerr County prays that the Commission (i) find that the County is an "affected party" with respect to the application of the GBRA for Permit Number 12378 and, thereafter, (ii) grant the County's request for a contested case hearing in this matter.

Respectfully submitted,

JACKSON, SJOBERG, MCCARTHY & TOWNSEND, L.L.P.

Edmond R. McCarthy, Jr.
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(512) 225-5606
(512) 225-5565 FAX

By: 

Edmond R. McCarthy, Jr.
State Bar No. 13367200

ATTORNEYS FOR KERR COUNTY, TEXAS

APPENDIX "A"

Kerr County's Original Hearing Request dated August 29, 2013



KERR COUNTY ATTORNEY

ROBERT HENNEKE

COUNTY COURTHOUSE, SUITE BA-103 • 700 MAIN STREET • KERRVILLE, TEXAS 78028

August 29, 2013

Ms. Bridget Bohac (MC 105)
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78767-3087

VIA ELECTRONIC FILING
AND FIRST CLASS MAIL

RE: GBRA Application for Permit No. 12378

Dear Ms. Bohac:

As authorized by the Kerr County Commissioners Court, this letter is submitted on behalf of Kerr County (the "County"), in regard to the above referenced matter (the "Application") filed by Guadalupe-Blanco River Authority ("GBRA"). Please consider this letter as the County's request (i) to be included on the mailing list for all future correspondence relating to the Application; and (ii) to request a contested case hearing related to the Application.

GBRA "seeks authorization to divert and use not to exceed 75,000 acre-feet of water per year from the unappropriated flows of the Guadalupe River" *See Notice of Application for Water Use Permit; see also Application, ¶2.A.* Upon information and belief, Kerr County understands that all water from the areas that GBRA seeks to divert and use is already fully appropriated. Kerr County maintains that the source of this alleged unappropriated flow should specifically be set forth in the application.

Special Condition 6(A - I) of the GBRA Application refers to diversions of water in the event of flow pulses events, Kerr County has concern that GBRA's authority to divert water in event of "a qualifying pulse flow event" would interfere with the same authority upstream by Kerr County in diversions of flow pulses.

The County entered into a Memorandum of Understanding with GBRA dated November 22, 1999 (the "MOU") wherein GBRA agreed that, "at any time after January 1, 2021 and prior to December 31, 2050, GBRA will support and assist Kerr County in obtaining from the TNRCC permits to divert water from the Guadalupe River or its tributaries at one or more diversion points within Kerr County for use within the County, up to a total diversion of not to exceed


6,000 acre-feet of water per year. . . GBRA also agreed that it "will reserve sufficient firm yield in Canyon Reservoir and/or other source of supply to allow GBRA to enter into such agreements for water from storage with Kerr County for such permits, through at least December 31, 2050, or such later date to be defined by GBRA." A copy of the MOU is attached hereto.

Special Condition 6(L) of Permit No. 12378 would authorize GBRA to store in and divert from the off-channel reservoir(s) other waters from the Guadalupe River Basin "so long as the underlying surface water right authorizes storage in the off-channel reservoir." By correspondence dated August 11, 2009 addressed to Mr. Ron Ellis relating to the Application, GBRA stated to TCEQ that it "is seeking recognition that water lawfully impounded in Canyon Reservoir is an acceptable source of such supplemental supplies" for Permit No. 12378 during periods when Guadalupe River diversions are not available. GBRA further represented to TCEQ that: (i) there is water supply available from Canyon Reservoir; (ii) it is not GBRA's intention to commit water supplies from Canyon Reservoir to the Mid-Basin Project "at this time"; and (iii) the delivery of stored water from Canyon Reservoir has no associated priority date. GBRA's prior representations to TCEQ make clear that it desires to release water from Canyon Reservoir as a supplemental water source for its Mid-Basin Project, and draft Special Condition 6(L) would allow GBRA to do so.

The County has interests that are not common to the general public, but are unique and may be impacted by issuance of the Draft Permit. In planning for future water demands in Kerr County, the County is relying, in part, upon the commitment made by GBRA in the MOU. If issued as proposed, the Draft Permit may impact on the commitment made by GBRA for regional water supply planning in Kerr County. It is likely that a special condition, or series of special conditions, could be added to the Draft Permit to ensure the commitments made by GBRA are not compromised by issuance of the Draft Permit, and the County looks forward to working with GBRA and TCEQ staff in this regard. However, in the interest of time, and given the administrative process to pursue negotiations, the County, at this time, must request a hearing on the Application.

For the reasons noted herein, Kerr County respectfully requests a contested case hearing on the Application and the associated Draft Permit. My mailing address, phone number and fax number are noted herein. The County also reserves the right to raise and pursue any and all issues that may be relevant to its interests in the event of a contested case hearing.

Sincerely,



Robert Henneke

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE COMMISSIONERS' COURT OF KERR COUNTY
AND
GUADALUPE-BLANCO RIVER AUTHORITY

This Memorandum of Understanding (this "MOU") is dated as of ^{November} October 22nd, 1999, by and between the Kerr County Commissioners' Court (the "Court") and the Guadalupe-Blanco River Authority ("GBRA"),

Recitals

WHEREAS, GBRA holds Certificate of Adjudication No. 18-2074, as amended, (the "Canyon Water Right"), which currently authorizes GBRA to impound water in Canyon Reservoir and divert and use therefrom not to exceed an average of 50,000 acre-feet of water per year for domestic, municipal, industrial, irrigation and recreational purposes; and

WHEREAS, GBRA has filed with the Texas Natural Resource Conservation Commission ("TNRCC") on August 29, 1997, an application for various amendments to the Canyon Water Right (hereinafter referred to as "GBRA's Application to Amend the Canyon Water Right"), including a request to authorize use of an amount of stored water from Canyon Reservoir in excess of the 50,000 acre-foot-per-year average that is currently authorized to be used under the Canyon Water Right; and

WHEREAS, the Court desires that a portion of the water supply benefit provided by the granting of GBRA's Application to Amend the Canyon Water Right be used to assist Kerr County in obtaining additional water supplies to provide for its future needs; and

WHEREAS, the Court anticipates that permits to divert a total of up to 6,000 acre-feet of water per year from the Guadalupe River or its tributaries at one or more diversion points within Kerr County, in addition to existing or future rights, may be sought by Kerr County from TNRCC in the future as a source of supply of raw water for use within the County; and

WHEREAS, the Court and GBRA recognize the importance of regional planning for water supply purposes; and

WHEREAS, the Court and GBRA are entering into this MOU to confirm that GBRA will make provision, in its planning, for this amount of possible additional permits, as provided in this MOU.

Agreement


IN CONSIDERATION of the foregoing and the mutual benefits and agreements contained herein, the Court and GBRA agree as follows:

1. Upon request from Kerr County, at any time after January 1, 2021 and prior to December 31, 2050, GBRA will support and assist Kerr County in obtaining from the TNRCC permits to divert water from the Guadalupe River or its tributaries at one or more diversion points within Kerr County for use within the County, up to a total diversion of not to exceed 6,000 acre-feet of water per year, pursuant to GBRA's then-standard agreement for "upstream

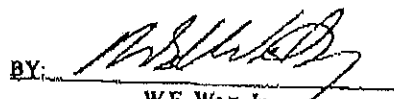
sales of water from storage". Such 6,000 acre-feet of water shall be in addition to and exclusive of any water rights granted to any applicant from Kerr County between January 1, 1999 and the date of such request including, but without limitation, the Upper Guadalupe River Authority and/or the City of Kerrville. Kerr County shall have and hereby reserves the right to transfer, convey, and assign all or any portion of such water or water rights to any person or entity for use within Kerr County.

2. GBRA will reserve sufficient firm yield in Canyon Reservoir and/or other source of supply to allow GBRA to enter into such agreements for water from storage with Kerr County for such permits, through at least December 31, 2050, or such later date to be defined by GBRA; GBRA will give the County notice specifying such date at least 180 days prior to the date. After such date, any portion of the reserved firm yield not committed by contract with Kerr County may be made available to other GBRA customers. However, nothing in this Section 2 is intended to preclude GBRA from assisting any future applicant within Kerr County, to the extent GBRA has sufficient firm yield available at the time.
3. This MOU is subject to and conditioned upon the TNRCC granting, in whole, GBRA's Application to Amend the Canyon Water Right. The Court has no objection to GBRA's application.

KERR COUNTY COMMISSIONERS' COURT

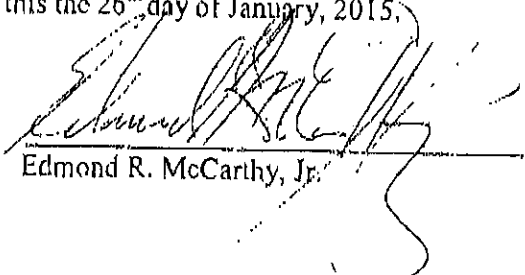
BY: 
Fred Henneke
Kerr County Judge

GUADALUPE-BLANCO RIVER AUTHORITY

BY: 
W.E. West, Jr.
General Manager

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing Reply of Kerr County to the Responses to Hearing Requests filed by the Executive Director and the Office of Public Interest Counsel in the foregoing matter was electronically filed with the Clerk of the Texas Commission on Environmental Quality by telecopier, as well as sent via e-mail and/or facsimile transmission as available and/or by Regular U.S. Mail to the attorneys and/or party representatives on the attached mailing list this the 26th day of January, 2015.



Edmond R. McCarthy, Jr.

MAILING LIST
GUADALUPE-BLANCO RIVER AUTHORITY
DOCKET NO. 2014-1658-WR; WRPERM 12378

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via e-file:

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DATE: January 26, 2015 **NO. PAGES (including cover):** 14

TO: Bridget C. Bohac, Chief Clerk, TCEQ **FAX NO.:** 512-239-3311 **CONTACT NO.:** 512-239-3300

FROM: Edmond R. McCarthy, Jr.

C/M NO.: Kerr County Water

RE: Guadalupe Blanco River Authority - Water Rights Application - TCEQ Docket No. 2014-1658-WR

ATTACHMENT: Yes

MESSAGE:

ORIGINALS TO FOLLOW: YES ☒ NO ☐